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LOOPER, VALERIE E.  
11726 LIGHTFALL COURT  
COLUMBIA, MD 21044

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JUN 16 2005

**OFFICE OF PETITIONS**

In re Application of :  
Lisziewicz, et al. : DECISION ON PETITION  
Application No. 10/081,922 :  
Filed: February 21, 2002 :  
Atty. Dkt. No.: RGT 9771 :  
:

This is a decision on the petition under 37 CFR 1.137(a), filed April 13, 2005, to revive the above-identified application.

The petition is **DISMISSED**.

Any request for reconsideration of this decision must be submitted within **TWO (2) MONTHS** from mail date of this decision. Extensions of time under 37 CFR 1.136(a) are permitted. The reconsideration request should include a cover letter entitled "Renewed Petition under 37 CFR 1.137(a)." This is not a final agency decision.

This application became abandoned December 23, 2004 for failure to timely reply to the final Office action mailed September 22, 2004. The final Office action set a three (3) month shortened statutory period of time for reply. No petition for extension of time was timely submitted. Notice of Abandonment was mailed April 4, 2005.

A grantable petition under 37 CFR 1.137(a) must be accompanied by: (1) the required reply, unless previously filed; (2) the petition fee as set forth in 37 CFR 1.17(l); (3) a showing to the satisfaction of the Commissioner that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to 37 CFR 1.137(a) was unavoidable; and (4) any terminal disclaimer (and fee as set forth in 37 CFR 1.20(d)) required pursuant to 37 CFR 1.137(c).

As to item (1), the instant application lacks the required reply. Petitioners have submitted the required fee for a request for continued examination, however, the instant petition is not accompanied by the required submission. See MPEP 706.07(h). Any renewed petition must be accompanied by the required reply, such as an amendment that places the application in condition for

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allowance, a notice of appeal, an RCE in full compliance with 37 CFR 1.114, or a continuation application.

As to item (3), petitioners have failed to present a showing to the satisfaction of the Commissioner that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to 37 CFR 1.137(a) was unavoidable.

The Office may revive an abandoned application if the delay in responding to the relevant outstanding Office requirement is shown to the satisfaction of the Commissioner to have been "unavoidable." See, 37 CFR 1.137(a)(3). Decisions on reviving abandoned applications have adopted the reasonably prudent person standard in determining if the delay was unavoidable. Ex parte Pratt, 1887 Dec. Comm'r Pat. 31, 32-33 (Comm'r Pat. 1887) (the term "unavoidable" "is applicable to ordinary human affairs, and requires no more or greater care or diligence than is generally used and observed by prudent and careful men in relation to their most important business"); In re Mattullath, 38 App. D.C. 497, 514-15 (D.C. Cir. 1912); Ex parte Henrich, 1913 Dec. Comm'r Pat. 139, 141 (Comm'r Pat. 1913). In addition, decisions on revival are made on a "case-by-case basis, taking all the facts and circumstances into account." Smith v. Mossinghoff, 671 F.2d 533, 538, 213 USPQ 977, 982 (D.C. Cir. 1982). A petition to revive an application as unavoidably abandoned cannot be granted where petitioner has failed to meet his or her burden of establishing the cause of the unavoidable delay. Haines v. Quigg, 673 F. Supp. 314, 5 USPQ2d 1130 (N.D. Ind. 1987).

A final Office action was mailed in the instant case on September 22, 2004. A response to the final Office action was submitted October 22, 2004. The response consisted of a copy of a previously submitted amendment and a request for an interview. As set forth in the Notice of Abandonment, submission of a copy of a previously submitted amendment and a request for an interview do not constitute a bona fide reply to the final Office action. Petitioners argue that they had "reasonably expected withdrawal and revision of the Final Rejection."

Petitioners' argument has been considered, but found unconvincing. A proper reply to the final Office action was required to consist of an amendment placing the application in condition for allowance, a notice of appeal, a request for

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continued examination, or a continuation application. Accordingly, petitioners' expectation that the final Office action would be withdrawn and revised is not deemed a reasonable explanation of unavoidable delay within the meaning of 37 CFR 1.137(a)(3).

Any renewed petition must be accompanied evidence to sufficiently establish that the entire period of time that a reply to the final Office action was due until the filing of a grantable petition has been unavoidable.

#### **ALTERNATE VENUE**

Petitioner is urged to consider filing a petition stating that the delay was unintentional. Petitioner's attention is directed to 37 CFR 1.137(b) which provides for the revival of an "unintentionally" abandoned application without a showing that the delay in prosecution or in late payment of an issue fee was "unavoidable." An "unintentional" petition under 37 CFR 1.137(b) must be accompanied by the required petition fee and reply.

The filing of a petition under 37 CFR 1.137(b) cannot be intentionally delayed and therefore must be filed promptly. A person seeking revival due to unintentional delay cannot make a statement that the delay was unintentional unless the entire delay, including the delay from the date it was discovered that the application was abandoned until the filing of the petition to revive under 37 CFR 1.137(b), was unintentional. A statement that the delay was unintentional is not appropriate if petitioner intentionally delayed the filing of a petition for revival under 37 CFR 1.137(b).

Further correspondence with respect to this matter should be addressed as follows:

By mail: **Mail Stop Petition**  
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By facsimile: (703) 872-9306

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Mail Stop Petition

Application No. 10/081,922

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Telephone inquiries concerning this matter may be directed to  
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